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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RONNIE ALVIN SELLERS,

Defendant and Appellant.

D051972

(Super. Ct. No. SCD207150)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed.

Ronnie Alvin Sellers appeals a judgment following his jury conviction of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).¹ On appeal, he contends that because the testimonies of two eyewitnesses identifying him as the perpetrator were unreliable, there is insufficient evidence to support his conviction.

¹ All statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

At about 9:00 a.m. on June 11, 2007, Kimberly Tran, a City of San Diego ground maintenance worker, was working in Balboa Park when she saw Sellers and Mark Jackson arguing about 100 feet from Jackson's campsite. She had previously seen both of them many times. Sellers and Jackson were shouting at each other. She then heard Jackson state he was going to lie down.

On that morning, Joseph Douat and Jocelyn Steer, husband and wife, were walking on a sidewalk in Balboa Park when they saw Sellers about 30 feet away walking toward them. Sellers was carrying a metal rod about three to four feet long. They watched Sellers because they thought it was odd that he was walking with a metal rod in the park. After Sellers passed them walking the other direction, they turned around and began following him at a distance of about 10 to 25 yards. After following Sellers for about five minutes, they saw him veer off the sidewalk and walk down a hill. They were about 20 yards away when they saw Sellers raise the metal rod above his head with both hands and swing it down full-force in a hatchet-like manner. On impact, Douat heard a noise like Sellers had hit a "bag full of something." Sellers dropped the metal rod and walked away.

Douat investigated and saw a man (Jackson) bleeding and attempting to stand up. Jackson stumbled toward Steer near the sidewalk and fell down. After unsuccessfully attempting to call 911, Douat and two park employees flagged down a police officer. One of those park employees was Tran, who recognized Jackson and told him to lie

down. Helping the responding officers look for the metal rod, Tran found the rod about eight to 10 feet away from Jackson's campsite. Between five and 10 minutes after police arrived, Douat and Steer saw a man walking on the sidewalk toward the scene. Douat pointed at the man (Sellers) and stated: "That's him. That's him, I think." Police then arrested Sellers.

Jackson was taken to a hospital. He sustained fractures to his nose and jaw. His jaw was wired shut for three months. He also suffered swelling around his eyes and had vision problems.

An information charged Sellers with assault with a deadly weapon (§ 245, subd. (a)(1)) and alleged in so doing he personally used a deadly weapon (§ 1192.7, subd. (c)(23)) and personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)).

At trial, the prosecution presented the testimonies of percipient witnesses Douat, Steer, Tran, Jackson, and the responding police officers, who testified substantially as described above. Douat and Steer identified a photograph of Sellers as depicting the man they saw holding the metal rod and swinging it down with both hands. Jackson testified that on June 11 he was homeless and living in Balboa Park. He testified he was sleeping and did not remember anything on June 11 before getting up from the ground bleeding. He had known Sellers for about one month and believed they were friends. Three days before June 11, he and Sellers had an argument regarding their female friend. During the ensuing physical altercation with Jackson, Sellers sustained minor injuries. After talking

the following day, Jackson believed he and Sellers made amends and were on good terms.

Sellers testified in his defense. On June 11, he was homeless and lived near Balboa Park. He had known Jackson for about six weeks. About three days before June 11, he and Jackson had a physical altercation and he (Sellers) suffered a scratch on his face that bled onto his pants. On June 10, he and Jackson "hung out" together and their relationship was back to normal. When Sellers woke up on Monday, June 11, he went to Pier G at the marina to attempt to get a job on a fishing boat so he could work his way to Alaska. Sellers left the marina at about 9:10 a.m. and arrived in Balboa Park at about 9:30 a.m. As he approached the area where Jackson lived, he saw ambulances and police officers. As he walked toward the scene to learn what had happened, a police officer stopped him, talked with him for a few minutes, and then arrested him. At trial, Sellers denied hitting Jackson with a metal pipe and denied ever having one. Although he was "a little bit mad" at Jackson a few days before June 11, he was not mad at him on June 11. He denied getting into a verbal argument with Jackson on June 11. He denied ever seeing Douat or Steer and denied walking past them on June 11.

The jury found Sellers guilty of the charged offense and found true the allegations. The trial court sentenced him to a two-year term for the assault offense and a three-year enhancement for personally inflicting great bodily injury, for a total term of five years. Sellers timely filed a notice of appeal.

DISCUSSION

I

Substantial Evidence Standard of Review

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The standard of review is the same where the prosecution relies mainly on circumstantial evidence. (*Ibid.*) In applying the substantial evidence standard of review, we do not reweigh the evidence and must presume every fact the trier could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) We do not substitute our evaluation of a witness's credibility for that of the trier of fact. (*People v. Lewis* (2001) 26 Cal.4th 334, 361.)

"Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) Furthermore, "[t]he uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.)

II

Substantial Evidence to Support Sellers's Conviction

Sellers contends there is insufficient evidence to support his conviction for assault with a deadly weapon because Douat's and Steer's identifications of him as the perpetrator were unreliable.

Douat. Sellers argues Douat's identifications of him as the perpetrator first at the scene and later at trial were unreliable. In the police officer's presence, Douat pointed to Sellers as the man who swung the metal rod and stated: "That's him. That's him, I think." At trial, Douat identified a photograph of Sellers as depicting the man who swung the metal rod. However, Douat admitted he was only 90 to 95 percent certain Sellers and the perpetrator were the same man. He also admitted he told police he *thought* Sellers was the same man and not that he was *sure* Sellers was the same man. At the scene, Douat recognized Sellers as the man because of his facial features, beard, darker clothing, and cap.

The jury was instructed with CALCRIM No. 315 regarding various factors to consider in evaluating a witness's identification testimony. Sellers argues that certain of those factors weigh against the reliability of Douat's identification of him as the perpetrator. He notes Douat admitted he did not know Sellers and had never seen him before June 11. Douat also admitted he had only about five minutes before the incident in which to view him and saw him from only a three-quarter's side angle at the time of the incident. Sellers also argues Douat's description of the perpetrator did not closely

match his description and instead described the average homeless man in San Diego. Sellers also argues Douat was not certain regarding his identification of him as the perpetrator, qualifying his identification that he *thought* Sellers was the perpetrator and he was only 90 to 95 percent certain of his identification of Sellers. Based on those considerations, Sellers argues Douat's identification of him as the perpetrator was unreliable and no rational trier of fact could rely on it to convict him beyond a reasonable doubt.

We are not persuaded by Seller's assertion that Douat's identification of him as the perpetrator was necessarily or inherently unreliable. Prior to the incident, Douat had an opportunity to view Seller's face and other features as he (Sellers) approached him from a distance of about 30 feet on the sidewalk. Douat presumably was virtually face-to-face with Sellers as he (Sellers) passed him going the other direction on the sidewalk. Douat paid special attention to Sellers because he was carrying a long metal rod, unusual for a person in Balboa Park. After turning around on the sidewalk, Douat then followed Sellers for about five minutes until Sellers walked down the hill and swung the metal rod at Jackson. On viewing Sellers shortly after the incident, Douat informed police that he believed (i.e., thought) Sellers was the man with the metal rod who swung it at Jackson. At trial, Douat identified a photograph of Sellers as depicting the perpetrator. Although Douat may have been 5 to 10 percent uncertain regarding his identification of Sellers, his 90 to 95 percent certainty regarding his identification did not make his identification necessarily or inherently unreliable. Rather, the reliability of his identification was a

question properly presented to and decided by the jury. The jury was properly instructed with CALCRIM No. 315 on factors to consider in determining the reliability of Douat's identification testimony. Because it is not our function on appeal to reweigh the evidence, we cannot conclude Douat's identification of Sellers as the perpetrator was unreliable and is therefore insufficient evidence of Sellers's identity as the perpetrator. (*People v. Bento* (1998) 65 Cal.App.4th 179, 193.)

Steer. Sellers also argues Steer's identifications of him as the perpetrator first at the scene and later at trial were unreliable. Although Steer testified at trial that the police did not ask her to identify Sellers as the perpetrator before his arrest, one officer testified that she told him she thought Sellers was the perpetrator. At trial, Steer identified a photograph of Sellers as depicting the man who swung the metal rod. Sellers argues Steer's identification was unreliable because she did not know him, had never seen him before, and saw him for only a few minutes before the incident. He also argues her identification may have been influenced by Douat's pronouncement at the scene that the man walking toward the scene (Sellers) was the perpetrator. Also, an officer testified Steer told him at the scene that the perpetrator looked about 40 years old, but Sellers testified he was 50 years old. Based on those considerations, Sellers argues Steer's identification of him as the perpetrator was unreliable and no rational trier of fact could rely on it to convict him beyond a reasonable doubt.

We are not persuaded by Seller's assertion that Steer's identification of him as the perpetrator was necessarily or inherently unreliable. As did Douat, prior to the incident

Steer had an opportunity to view Seller's face and other features as he (Sellers) approached her from a distance of about 30 feet on the sidewalk. Steer presumably was virtually face-to-face with Sellers as he (Sellers) passed her walking the other direction on the sidewalk. Steer paid special attention to Sellers because he was carrying a long metal rod, unusual for a person in Balboa Park. After turning around on the sidewalk, Steer, along with Douat, then followed Sellers for about five minutes until Sellers walked down the hill and swung the metal rod at Jackson. On viewing Sellers shortly after the incident, Steer apparently informed police that she thought Sellers was the man with the metal rod who swung it at Jackson. At trial, Steer identified a photograph of Sellers as depicting the perpetrator. Based on this record, there is nothing in Steer's identification of Sellers that made it necessarily or inherently unreliable. Rather, the reliability of her identification of Sellers was a question properly presented to and decided by the jury. The jury was properly instructed with CALCRIM No. 315 on factors to consider in determining the reliability of Steer's identification testimony. Because it is not our function on appeal to reweigh the evidence, we cannot conclude Steer's identification of Sellers as the perpetrator was unreliable and is therefore insufficient evidence of Sellers's identity as the perpetrator. (*People v. Bento, supra*, 65 Cal.App.4th at p. 193.)

Sufficiency of the Evidence. Sellers's identification as the perpetrator by two eyewitnesses, Douat and Steer, provided substantial evidence to support the jury's finding that he was the perpetrator of the assault on Jackson. Furthermore, the identification of Sellers by just one of those eyewitnesses (Douat *or* Steer) would have been sufficient

evidence to prove his identity as the perpetrator of the assault. (*People v. Boyer, supra*, 38 Cal.4th at p. 480.) There is nothing in the record showing the identification of Sellers by Douat or Steer was either physically impossible or inherently improbable. (*People v. Scott, supra*, 21 Cal.3d at p. 296.)

We also note that Tran's testimony provided corroborating evidence of Seller's identity as the perpetrator and of a possible motive for his assault on Jackson. At trial, Tran testified she saw Sellers and Jackson arguing near Jackson's campsite about 45 minutes before the incident. Because she was familiar with Sellers, her testimony helped place him near the scene shortly before the incident. Furthermore, her testimony also contradicted and served to discredit Sellers's trial testimony that he went to the marina that morning and first arrived at Jackson's campsite at 9:30 a.m. (i.e., after the incident). Tran's testimony also tended to show Sellers was angry with Jackson that morning, despite testimony to the contrary by Sellers and Jackson.²

Based on our consideration of the whole record most favorably to the judgment, we conclude there is substantial evidence (i.e., reasonable, credible evidence of solid value) that a reasonable trier of fact could find Sellers guilty of assault with a deadly weapon beyond a reasonable doubt.³ (*People v. Rodriguez, supra*, 20 Cal.4th at p. 11.)

² Because Jackson could not remember anything prior to the incident that day, his testimony that he and Sellers had made amends before that day did not necessarily preclude a reasonable inference that he and Sellers argued the morning of June 11.

³ Because Sellers does not argue there is insufficient evidence to support findings on the other elements of assault with a deadly weapon, we have focused our review of the

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.

record on the evidence in support of the identity element (i.e., that Sellers was the perpetrator of the assault).